

STATE OF MICHIGAN
COURT OF APPEALS

In re Z. Alston, Minor.

UNPUBLISHED
March 17, 2016

No. 328667
Sanilac Circuit Court
Family Division
LC No. 13-035707-NA

Before: SERVITTO, P.J., and SAAD and O'BRIEN, JJ.

PER CURIAM.

Respondent appeals as of right the order terminating her parental rights to the minor child, ZA, under MCL 712A.19b(3)(c)(i) (conditions that led to adjudication continue to exist); (g);(failure to provide proper care or custody), and (j) (reasonable likelihood, based on conduct or capacity of custodian, that child will be harmed if returned home). Because respondent's procedural due process rights were violated and her argument on this issue is not a collateral attack on the trial court's jurisdiction, her plea of admission, the subsequent adjudication, and the termination order must be set aside. Reversed and remanded for proceedings not inconsistent with this opinion.

On appeal, respondent first contends that her procedural due process rights were violated by virtue of the trial court's acceptance of a written stipulated plea of admission as the sole basis for its exercise of jurisdiction. We agree.

Whether proceedings complied with a party's right to due process presents a question of constitutional law that we review *de novo*. *Sidun v Wayne Co Treasurer*, 481 Mich 503, 508; 751 NW2d 453 (2008). However, where, as here, the constitutional challenge was not raised in the trial court, the issue is unpreserved. Unpreserved constitutional challenges are reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *Id.* "The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Id.* Reversal is warranted when an error seriously affects the fairness, integrity, or public reputation of the judicial proceedings. *Id.*

"Due process requires fundamental fairness, which is determined in a particular situation first by 'considering any relevant precedents and then by assessing the several interests that are at stake.'" *In re Rood*, 483 Mich 73, 92; 763 NW2d 587 (2009)(citation omitted). In Michigan,

the procedures to ensure due process to a parent facing removal of her child from the home or termination of her parental rights are set forth primarily by statute and court rule. *Id.* at 93.

MCL 712A.2(b) provides the circuit court with jurisdiction in proceedings concerning a juvenile under age 18 within the county:

(1) Whose parent or other person legally responsible for the care and maintenance of the juvenile, when able to do so, neglects or refuses to provide proper or necessary support, education, medical, surgical, or other care necessary for his or her health or morals, who is subject to a substantial risk of harm to his or her mental well-being, who is abandoned by his or her parents, guardian, or other custodian, or who is without proper custody or guardianship. . . .

(2) Whose home or environment, by reason of neglect, cruelty, drunkenness, criminality, or depravity on the part of a parent, guardian, nonparent adult, or other custodian, is an unfit place for the juvenile to live in.

Consistent with the above, the Department of Human Services (DHS) filed a petition with the trial court seeking jurisdiction over ZA based upon respondent's neglect. The circuit court authorized the petition, thereafter held a preliminary hearing (see MCR 3.965), at which respondent was present, and ordered the matter to mediation with a pretrial hearing to immediately follow the mediation.

As set forth in MCR 3.965(B)(5), at a preliminary hearing, the circuit court is to determine if the petition should be dismissed or the matter referred to alternate services. The circuit court must also advise the respondent of the right to trial on the allegations in the petition. MCR 3.965(B)(7). Respondent demanded a trial by jury on the allegations in the petition. A scheduling order entered on September 11, 2013, indicates that a one-day jury trial on the allegations contained in the petition was scheduled for November 15, 2013.

However, on October 23, 2013, respondent signed a "Stipulated Plea of Admission" wherein she purported to admit by plea certain facts contained in the petition and "thereby grants th[e] Court jurisdiction on the basis of her plea of admission." The stipulated plea contained statements that respondent understood her right to an attorney and her understanding of the consequences if the circuit court accepted her plea of admission including: that she would be waiving the right to a judge or jury trial and the right to witnesses; that her child could become a temporary ward of the court and placed outside of her home; that the plea could be used to terminate her parental rights, and that she acknowledges that her plea is knowing and voluntary. The circuit court entered an "Order of Adjudication" on October 25, 2013, finding "based upon the execution of [respondent's] plea of admission, that there are statutory grounds to exercise jurisdiction over this minor child The specific findings of fact are as stipulated herein by the parties." Entry of the order was an improper procedural method by which to take jurisdiction over the minor child.

MCR 3.971 provides as follows:

(A) General. A respondent may make a plea of admission or of no contest to the original allegations in the petition. The court has discretion to allow a respondent to enter a plea of admission or a plea of no contest to an amended petition. The plea may be taken at any time after the filing of the petition, provided that the petitioner and the attorney for the child have been notified of a plea offer to an amended petition and have been given the opportunity to object before the plea is accepted.

(B) Advice of Rights and Possible Disposition. Before accepting a plea of admission or plea of no contest, the court must advise the respondent on the record or in a writing that is made a part of the file:

(1) of the allegations in the petition;

(2) of the right to an attorney, if respondent is without an attorney;

(3) that, if the court accepts the plea, the respondent will give up the rights to

(a) trial by a judge or trial by a jury,

(b) have the petitioner prove the allegations in the petition by a preponderance of the evidence,

(c) have witnesses against the respondent appear and testify under oath at the trial,

(d) cross-examine witnesses, and

(e) have the court subpoena any witnesses the respondent believes could give testimony in the respondent's favor;

(4) of the consequences of the plea, including that the plea can later be used as evidence in a proceeding to terminate parental rights if the respondent is a parent.

(C) Voluntary, Accurate Plea.

(1) *Voluntary Plea.* The court shall not accept a plea of admission or of no contest without satisfying itself that the plea is knowingly, understandingly, and voluntarily made.

(2) *Accurate Plea.* The court shall not accept a plea of admission or of no contest without establishing support for a finding that one or more of the statutory grounds alleged in the petition are true, preferably by questioning the respondent unless the offer is to plead no contest. If the plea is no contest, the court shall not question the respondent, but, by some other means, shall obtain support for a finding that one or more of the statutory grounds alleged in the petition are true. The court shall state why a plea of no contest is appropriate.

Here, there is nothing to indicate that *the court* advised respondent on the record or in a writing all of the requisite information set forth in MCR 3.971(B). Moreover, there is nothing to indicate that the circuit court satisfied itself that respondent's plea was knowingly, understandingly, and voluntarily made, or that the circuit court established support for a finding that one or more of the statutory grounds alleged in the petition were true. MCR 3.971(C). As indicated in *In re Wangler*, 498 Mich 911; 870 NW2d 923 (2015), when a circuit court violates MCR 3.971(C)(1) by failing to satisfy itself that a respondent's plea was knowingly, understandingly, and voluntarily made, and violates MCR 3.971(C)(2) by failing to establish support for a finding that one or more of the statutory grounds alleged in a petition were true, its assumption of jurisdiction over a minor child based on the plea violates due process.

In *Wangler*, as in the present case, the circuit court ordered the parties in a child protective proceeding to participate in mediation.¹ *In re Wangler*, 305 Mich App 438, 441; 853 NW2d 402 (2014), rev'd 498 Mich 911. Also, like the present case, the respondent in *Wangler* signed a written plea agreement following mediation wherein she admitted certain allegations in the petition in order to confer jurisdiction over the minor children. *Id.* The court in *Wangler*, however, held the adjudication in abeyance for six months. *Id.* Almost a year later, the circuit court took jurisdiction, pursuant to the agreement, during a hearing at which the respondent was not present. *Id.* at 442. Our Supreme Court, in reversing this Court's decision, held that in accepting the respondent's written plea of admission the circuit court violated MCR 3.971(C)(1) and (C)(2) and that "[t]herefore, the manner in which the trial court assumed jurisdiction violated the respondent-mother's due process rights." *Wangler*, 498 Mich 911.

Consistent with our Supreme Court's decision in *Wangler*, 498 Mich 911, and with MCR 3.971, we also find that the circuit court violated respondent's due process rights. Thus, respondent demonstrated plain error affecting her substantial rights that seriously affected the fairness and integrity of the proceedings. *Carines*, 460 Mich at 763.

Nevertheless, appellee asserts that respondent's argument concerning due process is barred from our consideration, as it presents an impermissible collateral attack on the circuit court's jurisdiction. Appellee cites to *In re Hatcher*, 443 Mich 426, 428; 505 NW2d 834 (1993) for the proposition that a challenge to the trial court's exercise of jurisdiction over a minor child (adjudication) can only be challenged on direct appeal of that jurisdictional decision, and may not be collaterally attacked in a later appeal of an order terminating parental rights. That is a correct citation of generally relevant law. *In re SLH*, 277 Mich App 662, 668-669; 747 NW2d 547 (2008) explains:

Ordinarily, an adjudication cannot be collaterally attacked following an order terminating parental rights. That is true, however, only when a termination occurs following the filing of a supplemental petition for termination after the issuance of the initial dispositional order. If termination occurs at the initial disposition as a result of a request for termination contained in the original, or amended, petition for jurisdiction, then an attack on the adjudication is direct and not collateral, as

¹ We note that *Wangler* occurred in the same circuit court as the present case.

long as the appeal is from an initial order of disposition containing both a finding that an adjudication was held and a finding that the children came within the jurisdiction of the court.

Here, termination occurred on June 19, 2015, only after an initial dispositional order had been entered on November 21, 2013, and after a supplemental petition had been filed on May 18, 2015. Consequently, appellee's argument has merit. Nevertheless, we conclude that the collateral attack rule does not necessarily bar challenges to procedural due process defects in termination hearings.

We find guidance and support for our conclusion in *In re Sanders*, 495 Mich 394; 852 NW2d 524 (2014). In that case, our Supreme Court held that the one-parent doctrine was unconstitutional because it violated a parent's due process protections by allowing a court to deprive a parent of fundamental rights without a specific adjudication of unfitness. *Id.* at 422. This Court subsequently determined that a *Sanders* challenge raised for the first time on direct appeal was a direct attack on the court's exercise of its dispositional authority rather than a collateral attack on jurisdiction. *In re Kanjia*, 308 Mich App 660, 669; 866 NW2d 862 (2014). This Court reasoned that a parent raising a *Sanders* challenge was "directly challenging the trial court's decision to terminate the respondent's parental rights without first having afforded the respondent sufficient due process, i.e., *an adjudication hearing at which the respondent's fitness as a parent was decided.*" *Id.* at 670. It is undisputed that in this case, an adjudication hearing was not held at which the circuit court could have assured compliance with MCR 3.971(B) and (C).

We recognize that the *Sanders* Court, and other cases addressing the one-parent doctrine, dealt with circumstances in which a respondent was *never* purported to have been adjudicated, whereas the circuit court in the instant matter purportedly adjudicated respondent by way of a written stipulated plea and an order of adjudication. However, respondent in this matter is still, as was the *Sanders* respondent, not attacking the circuit court's *jurisdiction* but is, instead, challenging the circuit court's dispositional authority based on insufficient due process during the adjudicative phase of the proceedings. As explained in *Kanjia*, 308 Mich App at 663, "[w]hile the adjudicative phase is only the first step in child protective proceedings, it is of critical importance because the procedures used in adjudicative hearings protect the parents from the risk of erroneous deprivation of their parental rights."

The United States Supreme Court has recognized the "interest of parents in the care, custody, and control of their children" as "perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v Granville*, 530 US 57, 65; 120 S Ct 2054; 147 L Ed 2d 49 (2000). Given the tantamount importance of parental interests in the care and custody of their children, the requirements set forth in MCR 3.971(B) and (C) for accepting a plea by a respondent in a child protective proceeding represent significant procedural due process protections and may not be sidestepped by a trial court in even the most minimal manner.

Because respondent's argument is not a collateral attack on the circuit court's jurisdiction, but rather a challenge to the circuit court's dispositional authority based on insufficient due process, and because respondent demonstrated plain error affecting substantial rights that seriously affected the integrity and reputation of the judicial proceedings, the plea

must be set aside. The subsequent adjudication and termination must also therefore be set aside. Due to our resolution of this issue, respondent's remaining arguments on appeal need not be addressed.

Reversed and remanded for proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ Henry William Saad
/s/ Colleen A. O'Brien